Supreme Court, U.S.
FILED
NOV 24 1999
CLERK

(3)

Case No. 99-522

In The Supreme Court of the United States

CITY OF MACEDONIA; JOSEPH MIGLIORINI, IN HIS OFFICIAL CAPACITY AS MAYOR AND JUDGE OF THE CITY OF MACEDONIA MAYOR'S COURT,
Petitioners,

v.

CHRISTOPHER DEPIERO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPPOSITION OF RESPONDENT TO MOTION AND BRIEF *AMICI CURIAE* OF ORANGE VILLAGE, OHIO, et al.

MELISSA GRAHAM-HURD
(Counsel of Record)
704 Landmark Building
7 West Bowery Street
Akron, OH 44308-1149
(330) 996-4099
Attorney for Respondent

I. The claim of *Amicus* Parties Orange Village and Ohio Municipal League that the case of *North v. Russell* overruled language in *Ward v. Village of Monroeville* which stated a *de novo* appeal of right cannot cure a due process violation, is not supported by any existing case law and is frivolous.

In their Brief (pp. 7, 13), Amicus parties Orange Village and Ohio Municipal League claim that this Court's decision in *North v. Russell*, 427 U.S. 328 (1976) overruled that part of *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), where the Court held that a criminal defendant is "entitled to a neutral and detached judge in the first instance" *Ward, supra* at 61-62, and that a trial *de novo* did not cure the constitutional denial of due process caused by the potential bias of a judge, *Ward*.

Far from overruling that part of *Ward v. Village of Monroeville, supra*, this Court distinguished the Kentucky system in *North v. Russell, supra*, where lay judges conducted trials and a convicted defendant was entitled to a trial *de novo* presided over by a lawyer-trained judge from the Ohio Mayor's Court system where a Mayor with wide executive powers presided over a trial. The issue in *North v. Russell , supra,* was not potential bias, as in *Ward v. Village of Monroeville, supra,* and as in the instant case, but whether a criminal defendant was entitled to be tried before a lawyer-trained judge in the first instance. Distinguishing between legal training as opposed to potential bias, this Court allowed a criminal defendant to be tried before a lay judge, so long as a convicted defendant was entitled as of right to a trial *de novo* before a lawyer trained judge. Nowhere in *North v. Russell, supra,* did the Court even remotely indicate that it was overruling any part of *Ward v. Village of Monroeville, supra*.

> Under *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 *** (1972), appellant argues that he is entitled to a lawyer-judge in the first instance. There the judge was also the mayor and the village received a substantial portion of its income from fines imposed by him

> as judge. Similarly in *Tumey v. Ohio*, 273 U.S. 510 *** (1927), the challenge was directed not at the training or education of the judge but at his possible bias due to interest in the outcome of the case, because as in *Monroeville* he was both mayor and judge and received a portion of his compensation directly from the fines. Financial interest in the fines was thought to risk a possible bias in finding guilt and fixing the amount of fines and the court found that potential for bias impermissible.
>
> ***Our concern in prior cases with judicial functions being performed by nonjudicial officers has also been directed at the need for independent , neutral and detached judgment, not at legal training.
>
> *North v. Russell*, 427 U.S. at 337

Since *North v. Russell, supra,* this Court has reaffirmed the legal principle that a criminal defendant is entitled to a neutral and detached judge in the first instance and a trial de novo does not cure the constitutional denial of due process caused by a potentially biased judge.

> [I]n *Ward v. Village of Monroeville* *** the possibility of a later *de novo* trial in another court was held to be of no constitutional relevance because the defendant was "entitled to a neutral and detached judge in the first instance."
>
> *Connally v. Georgia*, 429 U.S. 245, 249-250 (1977)

> Appellee correctly points out that in *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S.Ct.80, 34 L. Ed.2d 267 (1972), we held that the availability of a trial *de novo* before an unbiased judge did not remove the constitutional infirmity in an original trial before one who impartiality was impaired.
>
> *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 247, f. 9 (1980)

> [D]ue process requires a "neutral and detached judge in the first instance," *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62, 93 S.Ct. 80, 84, 34 L. Ed.2d 267 (1972)*** Even appeal and a trial *de novo* will not cure a failure to provide a neutral and detached adjudicator. 409 U.S., at 61, 93 S.Ct. At 83.
>
> *Concrete Pipe and Products v. Construction Laborers Pension Trust*, 508 U.S. 602, 617-18 (1993)

In light of *Connally v. Georgia, supra; Marshall v. Jerrico, Inc. supra;* and *Concrete Pipe and Products v. Construction Laborers Pension Trust, supra,* reaffirming the holding in *Ward v.*

Village of Monroeville, supra that a criminal defendant is entitled to a "neutral and detached judge in the first instance" and that a trial *de novo* does not cure the constitutional denial of due process in subjecting a person to a potentially biased judge and with no case law to the contrary, the claim of *Amici* Orange Village and Ohio Municipal League that *North v. Russell, supra* overruled in part *Ward v. Village of Monroeville, supra,* is devoid of any legal basis and is frivolous.

II. The court structure in the Commonwealth of Kentucky today does not bear any resemblance of what *Amici* Village of Orange and Ohio Municipal League claim it to be.

Contrary to the claim of *Amici* Village of Orange and Ohio Municipal League, Courts in the Commonwealth of Kentucky today do not hear cases in a local decentralized manner as was the situation in *North v. Russell, supra.* Even at the time of *North v. Russell, supra,* this Court recognized that the days of the police courts were to end on January 1, 1978 as such courts were being replaced with centralized District Courts. *North v. Russell,* 427 U.S. at 331, f. 3.

The system which *Amici* claim in the brief to exist in Kentucky and seek to duplicate in Ohio with Mayor's Courts, where police courts with lay judges conducted trials followed by a trial *de novo* appeal as of right before a lawyer trained judge, has long since ended. Today, under Kentucky Constitution §115, "Appeals shall be upon the record and not by trial de novo." Parenthetically, Kentucky Constitution §122 provides that "No district judge shall serve who has not been a licensed attorney for at least two years."

III. An Ohio Mayor of a Municipality not the site of a Municipal Court may still hear and decide cases on a local level provided that the Municipality complies with the Constitution of the United States.

Contrary to the assertion made by *Amici* Orange Village, it still remains free to have its Mayor

preside as Judge of the Mayor's Court and adjudicate cases, provided it first amends it City Charter and divests the Mayor of his wide executive powers which include Chief Executive Officer responsible for the financial condition of the Municipality and Chief Law Enforcement Officer responsible for enforcement of municipal and state law. With the divestiture of the Mayor's wide executive powers and its transfer of such power to a City Manager, the Mayor would be functioning in a judicial capacity as the Mayor of Xenia did in *Dugan v. Ohio*, 277 U.S. 61 (1928), where this Court upheld a system where a Mayor with diluted executive powers presided over a Mayor's Court and which case was followed by the Court of Appeals in the instant case. Similarly, the Mayor of Orange Village with newly diluted executive powers would then be functioning as did the judge in *North v. Russell, supra.*, with a lack of wide executive powers and the accompanying potential bias, just as the old Kentucky system *Amici* desires. The Kentucky system *Amici* desires already exists in Ohio in those Municipalities where a city manager is the Chief Executive Officer and the Mayor presides over Mayor's Court.

What *Amici* Orange Village and Ohio Municipal League are requesting as a matter of "public policy" is for this Court to overrule that part of *Ward v. Village of Monroeville, supra*, which held that a criminal defendant is entitled to a "neutral and detached judge in the first instance" and allow even the most egregious examples of bias, both in appearance (chief law enforcement officer presiding over a trial and issuing warrants) and occurrence ("This is one of my guys, he's a good officer and I have no reason to doubt him" *Rose v. Village of Peninsula*, 875 F. Supp. 442, 452, f. 7) to occur so long as a trial *de novo* was available. This shocking result would be the end of Due Process in the United States of America as we know it.

Nearly 800 years ago, the *Magna Carta* promised that "No sheriff, constable, coroners, or

other bailiffs of ours shall hold the pleas of the crown" Magna Carta, (1215), ¶24. Finally, in 1999, Ohio, the last remaining state where law enforcement officers simultaneously sat as judges has ended. The decision in this case by the United States Court of Appeals for the Sixth Circuit striking down the Ohio Mayor's Court system where a Mayor with wide executive powers presides over a Mayor's Court is consistent with the foundational principles of Due Process established in the *Magna Carta* and the Fifth and Fourteenth Amendments to the Constitution of the United States and consistently followed by this Court.

For the reasons provide in his Brief in Opposition and in this Opposition to Motion and Brief of *Amici Curiae*, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

Melissa Graham-Hurd

MELISSA GRAHAM-HURD
Attorney for Respondent

CERTIFICATION OF SERVICE

Counsel for the Respondent hereby certifies that three copies of the Opposition of Respondent to Motion and Brief Amici Curiae were sent by regular U.S. mail on this 24th day of November, 1999 to the following:

John G. Peto
Brian D. Sullivan
Reminger & Reminger Co., L.P.A.
Suite 600
The 113th St. Clair Building
Cleveland, OH 44114

Barry M. Byron
John Gotherman
4230 State Route 306
Suite 240
Willoughby, OH 44094

Melissa Graham-Hurd

MELISSA GRAHAM-HURD

head of the Municipality;

(vii) Execute all contracts, conveyances, evidences of indebtedness and all other instruments to which the Municipality is a party;

(viii) Have custody of the seal of the Municipality and affix it to all official documents, but the absence of the seal shall not affect the validity of any such instrument; and

(ix) Perform such other duties as are conferred or required by this Charter, or by any ordinance or resolution of Council, or by the general laws of the State of Ohio not inconsistent therewith.

The Mayor shall be recognized as the official and ceremonial head of the municipal government by the Governor of Ohio for military purposes, and by the courts for the purposes of serving civil process.

(B) The Mayor shall have the right to discipline and terminate the employment of any officer or employee whom the Mayor appoints in the following manner:

(i) With respect to the Police Chief, police officers and patrolmen, to discharge from employment, suspend, transfer, reduce in rank or otherwise discipline. Said action shall be final unless the person so disciplined requests a review of the action in writing to the Council President within ten (10) days of the effective date of the Mayor's action. The request for review shall contain in addition to all points on which the officer relies in support of his or her claim and shall be placed on the agenda for the meeting of Council either next following the expiration of such ten (10) day period or within twenty (20) days. All interested persons may be present to present information to the Council. A vote of five (5) members of Council shall be necessary to reverse the Mayors's action;

(ii) With respect to all other non-elected officers and employees over whom the Mayor has the power to appoint, the power to discipline, suspend, transfer,

reduce in rank or discharge from employment.

(C) Except as otherwise specifically provided in subparagraph B(i) all actions taken pursuant to Section 5(B) shall be final and conclusive, and no right of appeal shall be available."

From Article V:

"SECTION 1. GENERAL PROVISIONS.

The Municipality shall have a Law Director, a Treasurer, an Architect, an Engineer, a Tax Administrator, and the following departments and commissions: Police, Fire, Building, and Planning and Zoning. Council shall provide by ordinance for the organization and duties thereof not provided for by this Charter.

Council may by ordinance establish new offices, departments, boards, and commissions or divisions thereof. The Mayor shall have the power to appoint, except for the Law Director, all officers and employees of said offices, departments, boards and commissions or divisions thereof subject to confirmation by a vote of four (4) members of Council; provided, that, subject to any contract rights of such officers and employees, Council may combine or abolish such offices, departments,

boards and commissions or divisions thereof as it may necessary or desirable and may authorize one person to be the head of two or more departments, boards or commissions or divisions thereof."